IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-775

THE CITY OF NEW ORLEANS AND
HONORABLE MOON LANDRIEU,
Appellant,

versus

NANCY DUKES d/b/a LOUISIANA CONCESSIONS,
Appellee.

Appeal from the United States Court of Appeals
for the Fifth Circuit

BRIEF ON BEHALF OF APPELLANT

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OPINION BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, may be found at 501 F.2d 706 (5th Cir. 1974).

JURISDICTION

This appeal is from a final judgment as to the constitutionality of a municipal ordinance of the City of

New Orleans handed down by the United States Court of Appeals for the Fifth Circuit on September 27, 1974 holding:

> "... appellant Dukes has overcome the presumption of constitutionality of the New Orleans ordinance's 'grandfather clause' by demonstrating the insubstantiality of the relation between the nature of the discrimination and the legitimate governmental interest in conserving the traditional aspects of the Vieux Carre . . . It is enough that the sum of the constitutional considerations examined outweighs the legislative presumption, so that we are not driven to balance each individual factor." 501 F.2d at 713.

The court further held the ordinance "unconstitutional as applied" and reversed a summary judgment which had been entered for appellant in the instant matter.

This Honorable Court has jurisdiction to review by direct appeal the Fifth Circuit's opinion by virtue of 28 U.S.C. §1254 (2).

ORDINANCE IN QUESTION

The municipal ordinance in question is 828 M.C.S. 46-1 and 46-1.1.

828 M.C.S. 46-1 is printed verbatim at page Vol. II, A. 1 of the appendix. 828 M.C.S. 46-1.1, reads as follows:

Section 46-1.1 Permits valid in the central business district.

Permits designated by the following subsection of Section 46-1: Subsections (1), (10), (12), (19), (21), (24), through and including (36), are valid within that area of the Central Business District bounded by the River on the East, Claiborne Avenue on the West, Esplanade Avenue on the North and Howard Avenue on the South. Vendors who have continuously operated the same business within that area under the authority of this chapter for eight (8) or more years prior to January 1, 1972 may obtain a valid permit to operate such business within that area. (M.C.S., Ord. No. 4744, § 3, 12-8-71; M.C.S., Ord. No. 4822, § 1, 4-13-72; M.C.S., Ord. No. 4957, § 1, 9-21-72; M.C.S., Ord. No. 5087, § 1, 2-15-73.)

QUESTIONS PRESENTED

1. PURSUANT TO 28 U.S.C. 1254 (2) DOES THIS HONORABLE COURT HAVE JURISDICTION TO HEAR AND DETERMINE THE QUESTION OF THE CONSTITUTIONALITY OF A MUNICIPAL CITY ORDINANCE HAVING BEEN DECLARED UNCONSTITUTIONAL BY A FEDERAL COURT OF APPEALS?

2. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED:

A.

IN FAILING TO RECOGNIZE THAT THE FRENCH QUARTER (VIEUX CARRE), THE HEART OF TOURISM IN THE CITY OF NEW ORLEANS, MUST, OF NECESSITY BE HIGHLY REGULATED IN ORDER TO MAINTAIN ITS DISTINCTIVE CHARM AND BEAUTY; AS ANY ADVERSE EFFECT ON ITS HISTORIC CHARACTER SEVERELY JEOPARDIZES THE ECONOMIC WELL-BEING OF THE ENTIRE CITY AND THEREFORE THE ORDINANCE IS DESERVING OF A MUCH MORE LIBERAL INTERPRETATION THAN THAT HANDED DOWN BY THE FIFTH CIRCUIT COURT OF APPEALS.

B.

IN HOLDING THAT THE PRESENT POSTURE OF THE MUNICIPAL ORDINANCES WAS VIOLATIVE OF EQUAL PROTECTION PRINCIPLES.

C.

IN HOLDING THAT THE RATIONALE OF THE NEW ORLEANS CITY COUNCIL IN ADOPTING THE QUESTIONED ORDINANCES WAS INSUFFICIENT TO SUPPORT THE DISCRIMINATION THEREBY IMPOSED.

D.

IN HOLDING THAT NANCY DUKES HAD OVERCOME THE PRESUMPTION OF CONSTITUTIONALITY OF THE NEW ORLEANS ORDINANCE'S "GRANDFATHER CLAUSE" BY DEMONSTRATING THE INSUBSTANTIALITY OF THE RELATION BETWEEN THE NATURE OF THE DISCRIMINATION AND THE LEGITIMATE GOVERNMENTAL INTEREST IN CONSERVING TRADITIONAL ASPECTS OF THE VIEUX CARRE.

E.

IN HOLDING THAT IN THEIR PRESENT POSTURE THE QUESTIONED ORDINANCES WERE UNCONSTITUTIONAL AS APPLIED.

STATEMENT OF THE CASE

Nancy Dukes brought this action against the City of New Orleans and the Honorable Mayor Moon Landrieu alleging a denial of equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

Before January 1, 1972, Dukes was in the business of selling food, drinks, confections, and novelties from push carts throughout the City of New Orleans. Subsequently the New Orleans City Council revised its ordinances, removing hot dog vendors from the list of specifically permitted pushcart enterprises in the Vieux Carre, but simultaneously allowing all licensed vendors who had continuously operated the same such licensed business in the Quarter for eight years prior to January 1, 1972, to continue selling, 828 M.C.S.

46-1. Since Dukes operation was only a year old, the effect of this revision was to eliminate her from the Vieux Carre market, but left the remainder of the city open to her. On January 17, 1972, one of Dukes' employees was arrested for violating New Orleans City Ordinance 828 M.C.S. 46-1.1 As a result of this arrest, Dukes initiated a Civil Suit in the United States District Court for the Eastern District of Louisiana, New Orleans Division on August 1, 1972 (Vol. I, A. 4), seeking declaratory and injunctive relief against defendants alleging that 46-1 and 46-1.1 were arbitrary, unreasonable and denied her due process and equal protection as guaranteed by the United States Constitution.

As there was no factual dispute to be resolved, cross motions for summary judgment were filed by both parties and after argument the Honorable Judge Jack Gordon granted defendant's motion, denied plaintiff's motion and dismissed the suit.

From that judgment plaintiff appealed to the United States Court of Appeals, Fifth Circuit which concluded that the ordinances in question as applied to Nancy Dukes deprived her of equal protection of the laws. The Court reversed and remanded the judgment appealed from, holding that the classificatory ordinances were not rationally guided and could not withstand constitutional attack.

ARGUMENT

I.

JURISDICTION

The Fifth Circuit Court of Appeals has held the questioned ordinance(s) "unconstitutional as applied" and therefore the judgment of the Court of Appeal is the proper subject of this appeal. Under 28 U.S.C. § 1254 (2) there is specific provision for appeals where an appellate court has held a state statute to be repugnant to the constitution, laws, or treaties of the United States:

> "Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:
>
> (2) By appeal by a party relying on a State Statute held by a court of appeals to be invalid as repugnant to the Constitution treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari in the instance of such appellant, and the review on appeal shall be restricted to the federal questions presented;"

For purposes of this provision, a "state statute" includes a municipal ordinance and city or borough charter.

In *Dusch* v. *Davis*, 387 U.S. 112 (1967), Justice Douglas pointed out most aptly that jurisdiction would be maintained under 28 U.S.C. § 1254 (2) and re-

versed the Fourth Circuit Court of Appeals' holding as to the constitutionality of certain borough charter provisions in Virginia. Again, in *City of Detroit* v. *Murray Corp. of America*, 355 U.S. 489 (1958), this Court assumed jurisdiction and passed on the constitutionality of city charter provisions of the City of Detroit.

More directly on point with the instant matter, this Court, in *City of Chicago* v. *Atchison, Topeka and Santa Fe Railway Company*, 357 U.S. 77 (1958), maintained jurisdiction under 28 U.S.C. § 1254 (2), and passed on the constitutionality of a municipal ordinance of the city of Chicago. *SEE ALSO: United Gas Pipeline Co.* v. *Ideal Cement Co.*, 369 U.S. 134 (1961) and *Watson* v. *Employers Liability Assurance Corp.*, 348 U.S. 66 (1954), rehearing denied, 348 U.S. 921 (1954).

In perhaps one of the most authoritative decisions in this area, this court, in *John P. King Mfg. Co.* v. *City Council of Augusta*, 277 U.S. 100 (1928) held, in expounding upon the predecessor of 28 U.S.C. § 1254 (2):

> "It of course rests with each state to determine in what form and by what agencies its legislative power may be exerted. It may legislate little or much in its Constitution, may permit the electorate to make laws by direct vote, may intrust its Legislature with wide lawmaking functions, and may delegate legislative authority to subordinate agencies, such as Municipal Councils and State Commissions. But whether this power be exerted in one form or another, or by one agency

> or another, the enactments put forth, whether called Constitutional provisions, laws, ordinances, or orders are in essence legislative acts of the State; they express its will, and have no force otherwise. As respects their validity under the Constitution of the United States, all are on the same plane." 277 U.S. at 103.

Accord: Lathrop v. *Donohue*, 367 U.S. 820 (1961), concerning a similar jurisdictional question wherein it was held:

> "Any enactment, from whatever source originating, to which a state gives the force of law is a statute, within the meaning of the clause cited relating to the jurisdiction of this court."

Certain requirements have evolved jurisprudentially over the years which must be met in order for a matter such as the one at bar to come within the ambit of the direct appeal provision of 28 U.S.C. § 1254 (2).

In *Slaker* v. *O'Connor*, 278 U.S. 188 (1929), this court construed the substantially identical predecessor of § 1254 (2) as requiring a "final" judgment in a case before an appeal could be taken. The *Slaker* case was followed without comment, as to § 1254 (2), by the per curiam opinion in *South Carolina Electric and Gas Company* v. *Fleming*, 351 U.S. 901 (1956).

In the present matter this requirement of finality has been met by the judgment of the Fifth Circuit that

the ordinance under consideration, 828 M.C.S. 46-1, 46-1.1, is unconstitutional. This holding was final and determinative on this point and as such must be followed, as to the federal constitutional question, on remand. The District Court can not now hold that the ordinance in question is constitutional, it only has to determine whether the questioned grandfather clause "was severable from the ordinance's simultaneous general preclusion of pushcart hot dog vendors from the Quarter, that is, whether the ordinance should be read as a total nullity, or whether it should be read to preclude the operation of all pushcart hot dog dealers in the Vieux Carre." In either case the Court of Appeals did finally determine that the grandfather clause was unconstitutional.

Mr. Justice White, in the recent case of *Cox Broadcasting Corporation* v. *Cohn*, ___ U.S. ___, 95 S.Ct. 1029 (1975), noted that the Court has recurringly encountered situations where a federal issue present in a particular case has been decided by an appellate court but in which there are further proceedings in the lower courts to come.

In a footnote to this decision Justice White again affirmed this court's approach to finality requirements citing the landmark decision, and the cases cited therein, of *Gillespie* v. *U.S. Steel*, 379 U.S. 148 (1964):

> "And our cases long have recognized that whether a ruling is 'final' . . . is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality. Because of this difficulty this Court has held that the requirement of finality is to be given a 'practical rather than a technical construction.' *Cohen v. Beneficial Industrial Loan Corp., supra*, 337 U.S. 541, at 546, 69 S.Ct. 1221, 93 L.Ed. 1528. See also *Brown Shoe Co. v. United States*, 370 U.S. 294, 306, 82 S.Ct. 1502, 1503, 8 L.Ed.2d 510; *Bronson v. Railroad Co.*, 2 Black 524, 531, 17 L.Ed. 347, 359; *Forgay v. Conrad*, 6 How. 201, 203, 12 L.Ed. 404. *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511, 70 S.Ct. 322, 324, 94 L.Ed. 299, pointed out that in deciding the question of finality the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.' " *Id.*, at 152-153, 85 S.Ct., at 311.

See also: MTM, Inc. v. Baxley, ___ *U.S.* ___, 95 S.Ct. 1278 (1975); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971); *Local #438* v. *Curry*, 371 U.S. 542 (1963); *Pope* v. *Atlantic C.L.R. Co.*, 345 U.S. 379 (1953); *Hudson Distributors Inc.* v. *Eli Lilly Co.*, 377 U.S. 386 (1964); *Radio Station WOW* v. *Johnson*, 326 U.S. 120 (1945).

When subjected to a reasonable interpretation, the judgment of the Fifth Circuit herein is final in all respects as to the federal constitutional questions, supra, particularly when viewed in light of the above jurisprudence.

Another recent decision in the area of finality is *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores*, 414 U.S. 156 (1973), in which a state supreme court held a statute to be unconstitutional

and remanded the matter for further consideration. This Court, after considering various circumstances under which the requirement of finality has been satisfied despite the fact that litigation had not terminated, entertained the case over claims that it had no jurisdiction. The federal issue had been finally determined and would not have survived the remand. *See also: Miami Herald Publishing Company* v. *Tornillo*, 418 U.S. 241 (1974), wherein jurisdiction was sustained based on the principles enunciated in the *North Dakota* case. In these two cases, as in the instant matter, the fact that the case was remanded had no material effect on the determination of the federal question which had become finalized in the lower court.

In a case similar to the one at bar a direct appeal to this court was upheld under 28 U.S.C. § 1254 (2) based upon a lower court's finding that a state statute was unconstitutional "as applied", which is much the same as the instant matter in that the Fifth Circuit held the same way on this point. *Dutton* v. *Evans*, 400 U.S. 74 (1970).

In view of the above cited and quoted jurisprudence it is respectfully submitted that a direct appeal to this Honorable Court does in fact lie from the decision of the Fifth Circuit Court of Appeals under 28 U.S.C. § 1254 (2) and this court has jurisdiction to hear and determine the constitutionality of 828 M.C.S. 46-1, 46-1.1 and the provisions therein; and, therefore, this case presents an excellent opportunity to put to rest the previously undecided "finality" question once and for all. *City of Chicago* v. *Atchison T. & S. F. Ry. Co.*, supra, and *City of El Paso* v. *Simmons*, 379 U.S. 497 (1965); in which the "finality" question was left open.

II.

ARE 828 MCS 46-1 AND 46-1.1 UNCONSTITUTIONAL?

Article XIV Section 22 of the Constitution of the State of Louisiana provides, in pertinent part:

> "§22. New Orleans; election of officers; form of government; powers; *home rule charters*
>
> Section 22. The electors of the City of New Orleans and of any political corporation which may be established within the territory now, or which may hereafter be embraced within the corporate limits of said city, shall have the right to choose their public officers, and the form of government of said city.
>
> Subject to the limitations elsewhere contained in this Constitution, *the City of New Orleans is hereby declared to have a home rule charter.*
>
> The City of New Orleans, in addition to the powers expressly conferred upon it by Act 159 of 1912, as amended through the Regular Legislative Session of 1950, shall have the right and authority to adopt and enforce local police, sanitary and similar *regulations* and *to do and perform all of the acts pertaining to its local affairs, property* and government, which are necessary or proper in the legitimate exercise of its corporate powers and municipal functions."

Chapter 8 of Article V of the Home Rule Charter, entitled "The Vieux Carre Commission" states the powers of the City Council in maintaining the charm, character and economic viability of the Vieux Carre as follows:

> "Section 5-803 Enforcement. The Council shall by ordinance or otherwise carry into effect provisions of the Constitution relative to the Vieux Carre Section and shall provide for the enforcement of such provisions by appropriate legal proceedings including resort to injunctive process."

The question now becomes whether or not 828 MCS 46-1 and 46-1.1 are able to withstand plaintiff's attack on their constitutionality as a violation of the "Due Process" and "Equal Protection" clauses of the Fourteenth Amendment to the United States Constitution.

A. Are All Types Of Discrimination Prevented By The Due Process And Equal Protection Clauses?

In the well known case of *Oregon v. Mitchell*, 400 U.S. 112, 125, 91 S.Ct. 260, 265 (1970) the United States Supreme Court said of discriminatory laws:

> "It cannot be successfully argued that the Fourteenth Amendment was intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves. The Fourteenth Amendment was surely not intended to make every discrimination

> between groups of people a constitutional denial of equal protection."

This is an indication that the Fourteenth Amendment is not to be interpreted as an overall prohibition against any and all types of discriminatory classification or treatment under state law. In *Lehnhouser v. Lake Shore Auto Parts Co.*, 93 S.Ct. 1001 (1973) the Court stated that the:

> "Equal protection clause does not mean that a state may not draw lines that treat one class of individuals or entities different from the others, and the test is whether the difference in treatment is an invidious discrimination."

Accord: *League of Academic Women v. Regents of University of California*, 343 F.Supp. 636 (N.D. Cal. 1973) where it was held that:

> "It is a far different thing to say that a statute extends a right to one group while denying it to another, than it is to say that a statute provides the same rights to everyone, but does not extend an additional right to any of them . . . The Fourteenth Amendment is not a mandate that every statute must be read to outlaw all forms of discrimination."

These cases represent only a small sample of a long line of jurisprudence upholding differences in statutory classification. They exemplify the fact that society today still provides for and maintains certain forms of necessary discrimination. By these statutory classifications the state is attempting to achieve

and maintain the general welfare of its citizens. Society's interests are weighed against the rights of particular individuals. There exists a compelling societal interest in these types of cases that predominates over individual rights and privileges.

This is precisely the issue involved in the case at bar. The interests of the City of New Orleans and the State of Louisiana are vitally affected by that section of the City known as the Vieux Carre. The economic welfare of the City of New Orleans rests on this specially designated area. It is the heart of the City's tourist industry. The incalculable value of this tourist trade prompted the City Council to adopt ordinances to preserve the integrity and to insure the economic viability of the area in a way most conducive to both tourist and citizen alike. This then is the compelling interest of the city which necessitated the enactment of the ordinance in question. No tourist or citizen appreciates peddlers or hawkers interfering with their rights to observe and enjoy the charm and beauty of the New Orleans Vieux Carre. Equal protection does not require that statutes never distinguish between citizens but only that distinctions that are made not be arbitrary or invidious.

In perhaps the landmark case in this area this Court held:

> "The Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly ir-

> relevant to the State's objective . . . *A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.*" *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101 (1961).

We reiterate the fact that the City of New Orleans has a valid compelling interest in protecting and preserving the Vieux Carre both as a valuable and productive tourist attraction as well as a beautiful and natural respite for its citizens to enjoy. This protection and preservation is impeded by the indiscriminate allowance of peddlers and hawkers to confront tourists and citizens. The fact that some peddlers are allowed to peddle and not the plaintiff in this action only tends to demonstrate the City Council's interest in keeping the Vieux Carre the tourist attraction it has always been. The Council sought to allow only those peddlers to remain who have over a long period of time become a part of the unique charm and beauty that is characteristic of the Vieux Carre while at the same time maintaining the vitally important economic viability of the area itself.

As the Comprehensive Study Plan and Program for the Vieux Carre, a study done under a grant from the Department of Housing and Urban Development, Vol. II, A. 31, demonstrates, the Vieux Carre plays a special and vital role in the economy of the City of New Orleans. Its unique economic character is shaped by the diverse elements constituting its market, such elements remaining from prior economic eras. This historic marketplace forms an integral part of the economic setting of the City of New Orleans, a major commercial center of both the south and the entire country:

> "Metropolitan New Orleans, with a population of over one million persons, is one of the major commercial centers in the South. It is a regional center of trade, services, and finance, and a major seaport ranking second to New York in dollar volume of goods exported." (Vol. II, A. 33-34.)

Therefore, anything having an adverse effect on the focal point of such an economic system has deleterious repercussions not only on the city but also on the state and even national economies.

There are several reasons for the economic importance of the Vieux Carre to the City of New Orleans, but this historic district makes its greatest contribution to the economy of the metropolitan area by serving as a principal attraction for tourists and citizens. As the study indicates "the Vieux Carre offers an authentic historic environment with specialty shops, restaurants, and lively night-time entertainment." The nationally publicized attractions of the French Quarter make it the most logical and lucrative location for the majority of the city's visitor services. Vieux Carre hotels and motels realize a major portion of the total monies gained by New Orleans from city-wide sales in transient accommodations. The impact of these hotels and motels goes far beyond simply sales information. Again, as the study indicates, "their most important contribution to the City's economy is the large numbers of potential customers housed in close proximity with the French Quarter's retail establishments." (Vol. II, A. 35). Also, new hotel and motel construction in the Vieux Carre, with its attendant buying and selling of real estate, has increased the value of real property in the area which is a good indicator of economic conditions and importance. High rents and increased property values are good indications of a healthy and viable business environment as well. These rising real estate values have fostered the rehabilitation and commercial or tourist use of many old and deteriorated properties in the Vieux Carre. Retail real estate needs in this area in coming years are expected to increase at a very high rate. (Vol. II, A. 31). This diverse pattern of land use in the Vieux Carre has not altered the area's status as a highly attractive place for in-town living as well. The area is close to the city's employment and entertainment centers and many small business establishments exist to cater to the needs of local residents, thus creating a mix of business and residential which is fairly unique in this country and adds immeasurably to the charm, beauty and economic viability of the entire city, much the same as Georgetown does for Washington D.C. (Vol. II, A. 31).

The single most important sector of the Vieux Carre's economy is retailing. Retail establishments employ thousands of citizens and account for hundreds of thousands of feet of floor space in the area. Thus the French Quarter plays a major role in several categories of metropolitan retail trade activity. (Vol. II, A. 31). A large number of the City's many antique shops, gift stores, art galleries, and other specialty shops are concentrated in this historic area. (Vol. II, A. 31). Nationally acclaimed "restaurants, bars, and nightclubs have made the French Quarter the entertainment center of the South and one of the most famous in the country." (Vol. II, A. 40). Support for these establishments comes mainly from tourists who

are charmed by the quaint and historic atmosphere of this monument to historic preservation.

Consequently it is of paramount importance that the City of New Orleans protect and preserve the Vieux Carre as an historic area of national significance. The City has a valid compelling interest in maintaining the French Quarter's "physical, social, and economic potential as an important tourist center, a resource for the citizens of metropolitan New Orleans, a desirable in-town residential district, a focal area for the arts and crafts, a major shopping and entertainment complex, and a vital part of the city's economic and tax base." (Vol. II, A. 50-51). Preservation and protection to be of any significance must encompass "both the physical and functional elements of the French Quarter that contribute to its identity and environmental unity." (Vol. II, A. 51). Efforts are being directed at the sum total effect, buildings plus environment. In the Vieux Carre the past has created the present which, in turn, is shaping the future economic viability of an entire city. Integral elements of the past and present charm and historic beauty which characterize this center of southern and national tourism will be destroyed by the indiscriminate allowance of hawkers and peddlers to fill its streets. The contemporary identity and economic utility of the Vieux Carre can best be understood as the product of historical continuity, so the City of New Orleans has a vested interest in preservation planning to assure the extension of a past continuity into the future. (Vol. II, A. 31).

Lucky Dogs, Inc., in whose favor the questioned ordinances allegedly produced a monopoly has been operating its same business in the Vieux Carre for

over twenty years. It has been and still is selling hot dogs from distinctive little carts, which are actually enlarged model versions of the product itself. Tourists, and citizens alike, for years have seen these carts spotted throughout the French Quarter, as a pleasant nostalgic reminder of their visit to the French Quarter, and often seek them out to photograph. The Fifth Circuit itself noted that the City might regulate the appearance of the pushcarts to satisfy the same concerns that prompted the ordinance. These quaint little carts, over the years have become as common a sight in the Vieux Carre as horse drawn carriages.

Traditionally Lucky Dogs has added to and become part and parcel of the charm and beauty that is characteristic of the New Orleans Vieux Carre much the same as Bourbon Street, St. Louis Cathedral, Jackson Square and the Cabildo have in their own way also become part and parcel of the Vieux Carre's unique charm and beauty thus achieving the unique mix of business and residential mentioned supra. Again they have been in the Vieux Carre for almost 20 years, and have become a most sought after element for use in both private and commercial photographs of French Quarter street scenes. Post cards showing sights in the Vieux Carre invariably will contain the carts and their costumed attendants. (Vol. II, A. 64-65). Newspaper photographs of world renowned Bourbon Street most often contain some portion of a Lucky Dog cart. (Vol. II, A. 66).

Magazine Guides to the City's annual Mardi Gras festivities often contain kind words about the inexpensive and forever present Lucky Dogs. (Vol. II, A. 67).

Lucky Dogs have gained for themselves through the years a place among the sights and sounds which are characteristic of New Orleans' number one tourist attraction. So much a part of the atmosphere of the French Quarter are the quaint carts and their costumed attendants that *New Orleans Magazine* featured one on its July, 1974 cover (Vol. II, A. 73). while stating about Lucky Dogs:

> "ON THE COVER: Hot Dog! Summer in the City! Kael Hanks is about to take a bite out of a Lucky Dog, one of the small delights offered to vacationers spending July at home." (Vol. II, A. 73).

Eastern Airlines' travel magazine, "*Pastimes*", even mentions Lucky Dogs among famous "Epicurean Specialties of the Vieux Carre". (Vol. II, A. 75). This is only a small sample of the local and national recognition received by this traditional and integral element in the charm and beauty of New Orleans' French Quarter which makes it the attraction it is.

It was for these reasons, not because of special or favored treatment of Lucky Dogs, that the questioned grandfather clause was enacted to prevent the indiscriminate allowance of peddlers and hawkers to ruin the economic viability of the Vieux Carre, which had become a major problem at the time of enactment, while maintaining those who had become a part of the Vieux Carre and in fact added to rather than detracted from its economic viability.

Appellants respectfully reiterate the fact that the City most definitely has a compelling interest in

maintaining the economic viability of this area, and in protecting it from the eroding effects which indiscriminate allowance of peddlers and hawkers would involve.

What the Fifth Circuit has done is to substitute its judgment for that of the City Council of the City of New Orleans, an action that has never been condoned by this court for it has never been the intention of this court to allow the judicial abrogation of the powers of duly elected public officials, a fact which is the main reason for the long line of cases favoring liberal interpretation of the constitutionality of municipal ordinances and statutes, particularly if their design and impact effects the economic well being of the city itself.

Simply stated, when a weighing process is involved effecting the long range economic welfare of an entire city as opposed to the short range desires of one individual, the judgment of the City Council, the representative of the people of the entire city *must* be given wide latitude and liberal construction unless patently offensive to the notions of equal protection and fair play.

In the recent case of *Frontiers* v. *Richardson*, 411 U.S. 677, 93 S.Ct. 1764 (1973) the Court flatly stated:

> "Under 'traditional' equal protection analysis, a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest."

Accord: *Jefferson* v. *Hackney*, 406 U.S. 535, 546, 92 S.Ct. 1724, 1731 (1972); *Richardson* v. *Belcher*, 404 U.S. 78, 81, 92 S.Ct. 254, 257 (1971); *Fleming* v. *Nestor*, 363 U.S. 603, 611, 80 S.Ct. 1367, 1372 (1960); *McGowan* v. *Maryland*, supra; *Dandridge* v. *Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161 (1970); *McDonald* v. *Board of Election Com'rs of Chicago*, 394 U.S. 802, 89 S.Ct. 1404 (1969); *U.S. Department of Agriculture* v. *Moreno*, 93 S.Ct. 2821 (1973).

In the *McDonald* case cited supra and also in the case of *Reed* v. *Reed*, 404 U.S. 71, 92 S.Ct. 251 (1971) the Supreme Court again emphasized the fact that it did allow certain discriminatory statutory law:

> "The Equal protection clause of the Fourteenth Amendment does not deny to states the power to treat different classes of persons in different ways; the clause does, however, deny the states the power to legislate that different treatment be accorded to persons or places by statute into different classes on basis of criteria wholly unrelated to the objective of that statute."

See also: *Eisenstadt* v. *Baird*, 405 U.S. 438, 92 S.Ct. 1029 (1972).

The court went on in *Reed* to say that:

> "In order not to violate the equal protection clause a statutory classification must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Applying these standards to the issue at bar defendants show that the ordinance in question is not violative of constitutional mandates in that it is patently reasonable and not arbitrary since its exclusion of certain peddlers is based on fair criteria that attempts to maintain the traditional atmosphere of the Vieux Carre which is so vitally necessary for its economic viability and the benefits derived by all citizens of New Orleans therefrom. This clearly is a compelling and valid objective.

See: *Turner* v. *Fouche*, 396 U.S. 346, 90 S.Ct. 532 (1970) where it was held that:

> "The traditional test for denial of equal protection is whether the challenged classification rests on grounds wholly irrelevant to the achievement of valid state objectives."

and: *Police Department of City of Chicago* v. *Mosley*, 408 U.S. 92, 92 S.Ct. 2286 (1972) in which the court succinctly stated:

> "Crucial in equal protection cases is whether there is an appropriate governmental interest suitably furthered by the differential treatment."

It is patently obvious that the economic viability of an area of a city is a valid and compelling purpose that should merit the government's protection through legislation; and, if this area of the city also is vitally

important in maintaining the overall economic well-being of the entire city, as is the Vieux Carre, then the interest in closely legislating and protecting the viability of the area is even more compelling. It is only invidious, unnecessary, and totally arbitrary classifications and treatment that the spirit and the letter of the Fourteenth Amendment prohibit. A classification or a statute having some reasonable basis does not offend the Constitution merely because it is not made with mathematical nicety, or the practice results in some inequality. The city should not be caused to lose its entire remedial scheme merely because it failed to cover every peddler at one time. It has been held that:

> "If the classification . . . is shown to have a substantial relationship to a lawful objective and is not void for other reasons, such as overbreadth, it will be upheld . . ." *Boroas v. Village of Belle Terre*, 476 F.2d 806 (2nd Cir. 1973)

Accord: *Godwin* v. *Patterson*, 363 F.Supp. 238 (M.D. Ala. N.D., 1973).

As this Court stated in *Norvell* v. *State of Illinois*, 373 U.S. 420, 83 S.Ct. 1366 (1963):

> "Exact equality is no prerequisite of equal protection of the laws within the meaning of the Fourteenth Amendment . . . *The rough accommodations made by government do not violate the equal protection clause unless the lines drawn are hostile and invidious.*"

and in *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District*, 93 S.Ct. 1224 (1973):

> "The equal protection clause does not make every minor difference in the application of laws to different groups a violation of our Constitution."

B. Does The Fourteenth Amendment Protect Plaintiff's Economic Interests?

This Court in the case of *Weber* v. *Aetna Casualty and Sur. Co.*, 406 U.S. 164, 92 S.Ct. 1400 (1972) stated that:

> "The essential inquiry . . . [in determining the validity of a state statute under the equal protection clause] . . . is a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"

Also in the case of *Kramer* v. *Union Free School District No. 15*, 395 U.S. 621, 89 S.Ct. 1886 (1969), this Court held:

> "In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification."

Accord: *Williams* v. *Rhodes*, 393 U.S. 23, 30, 89 S.Ct. 5, 10 (1968).

The case at bar necessarily involves a weighing process concerning the interests of the City of New Orleans and those of the plaintiff, Nancy Dukes. As we have previously shown, the ordinance in question is attempting to protect the charm, beauty and tradition that are so vitally necessary for the economic productivity of an entire area of the City as well as that of the City itself. To this end the City has a valid and compelling interest in preventing the enjoyment of this area by tourists and citizens alike from being hindered and lessened by the intervention of innumerable peddlers and hawkers physically soliciting and bothering them so as to lessen their enjoyment of the Vieux Carre. Plaintiff is attempting to protect an alleged right to sell her goods in the Vieux Carre from interference by the City. It is most vehemently argued that while plaintiff is free to sell her wares anywhere else in the entire City, the prevention of their sales in the Vieux Carre does not endanger or invade any fundamental personal right possessed by the Plaintiff. Rather, her right to sell food, soft drinks and confections in the Vieux Carre must be balanced against the City's compelling interest in preserving this area for its very economic well-being; for if both citizens and tourists alike are bothered to the extent that they cease to frequent the Vieux Carre then the economic stability of the entire city will be in severe jeopardy.

In the case of *Levy* v. *Louisiana*, 391 U.S. 68, 88 S.Ct. 1509 (1968), this Court held that:

> "In applying the equal protection clause to social and *economic* legislation, we give great latitude to the legislature in making classifications."

And even more succinctly in *Palmer* v. *Thompson*, 403 U.S. 217, 91 S.Ct. 1940 (1969) the Court held:

> "The right to equal protection does not promise or guarantee economic or financial equality."

Likewise in the case of *San Antonio Independent School District* v. *Rodriquez*, 411 U.S. 1, 93 S.Ct. 1278 (1973) the Court said:

> ". . . at least where wealth is involved the Equal Protection Clause does not require absolute equality or precisely equal advantages."

In the case of *In Re Hoover*, 447 F.2d 195 (5th Cir. 1971) a Louisiana statute affording preferential treatment of sellers of goods sold in the state over sellers of goods sold outside the state was held not so unreasonable and arbitrary as to be invidiously discriminating and violative of the equal protection clause.

These cases lend credence to the assertion that the spirit of the Fourteenth Amendment is designed to protect the more fundamental and personal rights from invidious discrimination or interference by state or municipal statutory law.

It is patently obvious that merely because an individual may be at some economic disadvantage this does not automatically make him the victim of an arbitrary, unreasonable and invidious discrimination which is violative of the equal protection clause, par-

ticularly where the state demonstrates a necessary and compelling interest necessitating the legislation.

One final point mentioned in *McGowan*, supra, is that the equal protection clause relates to equality between *persons* as such, rather than between areas and therefore territorial uniformity is not a constitutional prerequisite within the ambit of the equal protection clause of the Fourteenth Amendment.

It is respectfully submitted that this is precisely the point in the instant matter for all Dukes is asserting is that she cannot go into the Vieux Carre and sell her food, soft-drinks and confections from pushcarts while she *can* ply her trade in the rest of the city. This is no equal protection argument at all particularly in view of *McGowan* and the fact that she is advancing a territorial argument and *not* a personal argument and particularly in view of the fact that in her brief to the 5th Cir. Court of Appeals, she is apparently now seeking only to sell hot dogs and therefore has abandoned her previous argument that there is an inequality between her and the *persons* who validly come under 828 M.C.S. 46-1 and 46-1.1.

C. Are All Legislative Monopolies Unlawful?

The Court of Appeals in its decision states that:

> "Of course it is true that not every statute treating uniquely some individual enterprise or some closed class of enterprises is constitutionally objected. Nevertheless, the creation of a protected monopoly for the favored

> class member is a significant factor to be considered in assessing the nature of the discrimination here."

Such a concept is precisely the point. The fact that only Lucky Dogs, Inc. qualified under the ordinance is expressive of the intent of the New Orleans City Council in enacting such ordinances dealing exclusively with the French Quarter. This section of the City is afforded special treatment in the City's Municipal Code. The alleged monopoly in the case at bar was incidentally created by the city in its effort to maintain, as is, its main tourist attraction. The questioned grandfather clause is illustrative of the desire, not to favor particular businesses, but to maintain only those features which over the years, over a score of years in this case, have become landmarks in this area of the City of New Orleans. It is an entire area of the City which is intentionally preserved, and not individual establishments. Such intent should be viewed in its entirety, and not dissected into each of its incidental side efforts. We urge this Honorable Court, therefore, to consider that such action on the part of the City of New Orleans represents a legitimate and compelling governmental interest in that the economic well-being of an entire city largely hinges on revenues derived from tourism generated in this distinctive area.

Consequently, based on appellants' assertion that the ordinances questioned in the case at hand represent legitimate governmental and legislative activity, any incidental adverse effects created thereby are outweighed by compelling state interests and therefore not objectionable. More specifically, the alleged monopoly found by the Court of Appeals to have been

created by the ordinances, was the result of valid and compelling legislative activity, and therefore not prohibited.

Similar monopolies legislatively created because of valid governmental interests have been upheld. In the case of *Ladue Local Lines, Inc.* v. *Bi-State Development Agency of The Missouri-Illinois Metropolitan District*, 433 F.2d 131 (1970) it was stated:

> "We deem it well settled that when a state announces a public policy against free competition in an industry essential to it, state control and regulation of that industry, even to the extent of eliminating competition, is permissible."

Also in the case of *Nebbia* v. *New York*, 291 U.S. 502, 529-530, 538, 54 S.Ct. 505, 512-513, 516, 78 L.Ed. 940 (1934) it was held:

> "The public policy with respect to free competition has engendered state and federal statutes prohibiting monopolies, which have been upheld. On the other hand, where the policy of the state dictated that a monopoly should be granted, statutes having that effect have been held inoffensive to the constitutional guarantees. Moreover, the state or a municipality may itself enter into business in competition with private proprietors, and thus effectively although indirectly control the prices charged by them.

> "If the lawmaking body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the Legislature to be fair to those engaged in the industry and to the consuming public."

Accord: *Heath* v. *Aspen Skiing Corporation*, 325 F.Supp. 223 (1971); *Sun Valley Disposal Co.* v. *Silver State Taxicab Operators' Ass'n.* v. *Yellow Cab Co.*, 278 F.Supp. 979 (1968).

CONCLUSION

It is respectfully submitted, that the decision of the Fifth Circuit, in holding that the rationale behind the questioned ordinances was insufficient to withstand attack, was erroneous in that said rationale represented a compelling governmental interest on the part of the city of New Orleans. This decision has wide ramifications, in that it could affect all alleged monopolies legislatively created in the public interest. Any governmental activity which resulted in such territorial discrimination could be challenged under this decision. We believe that the questions submitted are truly substantial and represent to this Court far reaching issues of the most vital public importance that must be answered.

Respectfully submitted,

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CERTIFICATE

The undersigned hereby certifies that a true and correct copy of the above and foregoing has been served on counsel of record by depositing same in the United States mail, postage prepaid, properly addressed this ____ day of June, 1975.